

OPPOSITION OF WAYNE G. STRANG TO PETITION FOR STAY FILED BY AMERICAN BUSINESS MEDIA

Background

On August 6, 2003, American Business Media filed a petition with the Commission requesting a stay of at least one-year in the implementation of the Commission's reversal of its earlier position that there is an exemption for an "established business relationship" when transmitting junk faxes. In addition, they would like a stay issued delaying implementation of the requirement that faxers obtain written confirmation of any consent to receive advertising faxes. I am a consumer and facsimile machine owner in the state of California, the "Junk fax Capital of the World", and strongly support the Commission's actions and urge rapid denial of ABM's Petition.

General Comments

Contrary to ABM's position, it is the Commission's earlier interpretation that was ill-founded and not grounded in the law, or even in the Commission's own regulations. The new Report and Order properly reflects the intent of Congress on this issue, and in addition provides a valuable protection to the fax machine owner.

47 USC §227(b)(1)(C)¹, the section at issue here, prohibits the transmission of any unsolicited advertisement via fax. The statute further defines "unsolicited advertisement" as "The term 'unsolicited advertisement' means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission."²

The Commission correctly noted in Note 87 of the Report and Order, released October 16, 1992 (that implemented the original regulations), "In banning telephone facsimile advertisements, the **TCPA leaves the Commission without discretion to create exemptions from or limit the effects of the prohibition** (see § 227(b)(1)(C)); thus, such transmissions are banned in our rules as they are in the TCPA. § 64.1200(a)(3)." [emphasis added].

The Commission went on, however, to **disregard its own words and the plain language of the statute**, and created the "established business relationship" exemption for junk faxes out of thin air! Through some tortured logic, using what I believe was flawed reasoning it had used in relation to prerecorded messages, the Commission concluded in Note 87 that, "We note, however, that facsimile transmission from persons or entities who have an established business relationship with the recipient can be deemed to be invited or permitted by the recipient. See para. 34, supra." This, as any legal dictionary will tell you, is **implied** permission and not **express** permission as required by the statute.

¹ "It shall be unlawful for any person within the United States... (C) to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine; or..."

² 47 USC 227(a)(4)

Therefore within a single footnote, the Commission properly stated the law, then ignored the law and used improper logic that it had applied previously to prerecorded messages, and concluded that there was an "established business relationship" exemption for junk faxes, a conclusion that it stated it could not come to just 30 words before!

To add to the problem, it should be noted that the "established business relationship" exemption for faxes does not appear in the law, does not appear in the regulations, and does not even appear within the body of the Report and Order.

The real irony here is that for eleven solid years the public has been saddled with a much abused exemption that does not exist anywhere but in a single comment. A comment it should be noted, that is contained only in a footnote, that is within a paragraph that deals with the **technical requirements** for facsimile machines!

The outcry over the Commission's reversal of its previous stance, only serves to demonstrate the lengths to which industry will go to evade the law and continue to **invade** our homes and consume our property.

Caving in to ABM's request would not only be contrary to Congressional intent and direction, it could result in a veritable flood of faxes transmitted by companies claiming an exemption under the most tenuous of relationships. The rights of a vast number of fax machine owners, who wish to retain **their** property for **their** use, could thereby be trampled based on the grouching of a few entities dissatisfied because their wishes aren't being granted.

As an example of abuse, mortgage companies³ are claiming exemption for prerecorded messages because people have applied for mortgages requiring a credit check through the credit bureaus that happen to be used by the advertising mortgage broker. Others claim exemption because, although independent, they deal with many nationwide mortgage lenders are therefore "affiliated" with them and hence may voiceblast the national lender's customer base. It is a simple leap from there to claiming the same "exemption" if the Commission improperly restores it to junk faxes.

It is easy to envision further erosions of the protections afforded by the TCPA. The industry has proven by past performance that it is capable of distorting any gap in the regulations into a vast chasm of unlawful advertising opportunity. "For the benefit of the few to the detriment of the many" is not a stated purpose of the TCPA.

Specific Comments

ABM's main objection seems to be that their members cannot fax renewal reminders to subscribers. This could be taken care of by a simple clarification from the Commission. The Commission can, and should, clarify that "express permission or invitation" once given, is valid for the entity it is given to until such time as it is revoked by a do-

³ Notably 1 Home Lending Corporation of Calabasas, CA

not-call request⁴. Thus **all** of members' faxes to a subscriber would be covered by **one** permission document, provided that the document clearly stated that faxes may contain advertisements for products, goods or services.

If the member organization wishes to fax ads on behalf of a third party however, that act would of course require permission be given specifically to that third party.

ABM's petition is filled with misconceptions, misleading statements and arguments that simply don't hold water. Although I am not a lawyer, and don't have access to the cases they cite, the mere context and wording of the citations lead me to believe they are misrepresenting the point of law ABM claims.

The lead misconception of course, was previously mentioned. Under the new regulations, ABM members are not required to get written permission every time they fax a document to a subscriber, customer or supplier, nor are they required to get permission on an annual, biennial or even bicentennial basis. The written permission is valid until such time as a do-not-call request is made. If that request is received fifty years after the original document was signed, that is the valid period of the consent.

ABM claims that a fax sent to confirm an ad placement requires written permission (P2)⁵. That of course, is ludicrous on its face. The document described does not fit the definition of an "unsolicited advertisement". A fax sent to request quotes for placing an advertisement in the publication would also not fit the definition, though it may serve as written permission for an answer to that specific query. A fax sent to request that an entity advertise in a publication, **would** fit the definition and be subject to the written permission requirement.

ABM also makes a statement that is a revelation of the practices of the telemarketing industry as a whole. "...American Business Media would be seeking a stay in order to allow its members time to examine and modify their fax lists and to **attempt to reformat documents that might be considered advertisements in order to be certain that they are not.**"

This is a tack the industry has been taking for the past 11 years. We have been besieged by prerecorded messages and faxes that are carefully crafted so that the violator may claim to be exempt because they only "inform" or "seek permission to call/fax" or are contacting the recipient "only for the purpose of setting up a face-to-face meeting". "We weren't trying to sell anything during the call!" is a mantra we have heard for far too long and that the Commission has finally put to rest in the new rules.

On page 4, ABM cries that, "...publishers can barely begin to modify their business practices and collect the signatures that the Commission now says are required." In note 3, they then have the audacity to complain, *"In fact, as of today [date of submission] the FCC's own*

⁴ Given the industry's propensity for misinterpreting plain English, the Commission should also make clear that "do-not-call" also means "do-not-fax".

⁵ All page numbers refer to pages in the ABM Petition.

website continues to advise the public that an established business relationship represents consent to the receipt of faxed advertisements." [italics in original] Well of course that's what it says. As of today, we are still operating under the Commission's current (and in my view, erroneous) position that there **is** such an exemption.

More to the original point, ABM's members were notified of the upcoming requirement for written evidence of express consent when the FTC issued its amended Telemarketing Sales Rule (TSR) on December 18, 2002. Any person reading the "express consent" portion of the TSR could reasonably conclude that the FCC would adopt the same provision in its rulemaking procedure. Thus ABM members cannot claim the new rule came as any big surprise. Thus they should already have been working on procedures and adopting practices that would make the transition. Instead, they have put their efforts into complaining about the new rules.

Once again we hear the cry that the Commission is banning all facsimile advertisements⁶. This fallacy has been around since the TCPA was initially put to the First Amendment test. The TCPA does not ban advertising by fax. It bans advertising by fax to those who have not granted the advertiser permission to use **their** resources. This time however we are confronted with, "...enhancing the chilling effect of the TCPA on the press..." (P5). The TCPA does **not** have any effect on the press, chilling or otherwise. It **does** restrict, and properly, how the press **advertises** itself, a whole different subject that ABM addresses later in its submission.

"Express vs. "implied" consent, the "established business relationship and written documentation

In its discussion of why it feels the standards for granting a stay are met, ABM again resorts to some interesting twists and turns. Stating, probably truthfully, that ABM members do not engage in broadcast faxing ABM notes that its members fax to people, "...who have otherwise provided their fax numbers, **presumably with the understanding** that they would be used." [emphasis added]

This is precisely the type of "implied consent" faxing that Congress explicitly rejected when it removed the "established business relationship" exemption for faxing from the TCPA. It is also the "implied consent" exemption the Commission improperly, and I believe accidentally⁷, reinserted in 1992. The Commission should not repeat that error.

The Commission is laudably correct in requiring written confirmation of consent. Unscrupulous faxers have long generated after-the-fact documents purporting to show "consent", and falsely authenticated those documents in court. The only way to curb this practice, and prevent it from becoming more widespread, is to require this confirmation.

Subscription renewal notices

⁶ At least ABM modifies the tired old saw by saying, "...virtually all faxed advertisements..." (P5), a distinction with not much difference.

⁷ See page 2 of this Opposition about the "irony" of the exemption.

ABM argues that subscription renewal notices are not "unsolicited advertisements" under the definition in the TCPA. That argument has merit and the Commission should consider a specific clarification that such notices, so long as they are faxed solely for the purpose of subscription renewal and do not also contain an "unsolicited advertisement", are exempt from the junk fax prohibition.

No matter what the Commission decides, it is not reason to grant the Petition for Stay.

Constitutionality and "freedom of the press"

ABM argument that the TCPA somehow impinges upon the First Amendment guarantee of a free press is at best, specious. Of all the arguments made by ABM, the most odious is this one.

In attempting to support its position, ABM at P14 cites Lovell v. City of Griffin, 303 U.S. 444 (1938) citing the Court as saying, "[l]iberty of circulating is as essential to that freedom [of the press] as liberty of publishing; indeed without the circulation, the publication would be of little value."

Webster's New World Dictionary defines *circulation* as, "5 a) the **distribution** of newspapers, magazines, etc. among readers;" Thus Lovell is actually speaking of restraint in the **distribution** of publications, not the **advertising** of them. Quite clearly the TCPA does not limit the distribution of publications It merely restricts the time, place and manner used to advertise the commercial availability or quality of those publications. ABM should be ashamed of itself for this attempted sleight of hand.

ABM is not likely to succeed in making this argument, and the stay should be denied.

Harm to other interested parties

ABM blithely states that if the status quo is maintained by granting the stay, the result will be less burdensome than if the requirement for written documentation were to go into effect. This is patently false.

The Commission recently issued a Notice of Apparent Liability for Forfeiture in the amount of \$5.4M to Fax.com Inc. Fax.com boasts having the capacity to transmit 3 million faxes per day to 30 million numbers in its database.

In a recent action filed by the Attorney General of the State of California, an employee of a junk fax company has been accused of falsifying documents (company generated documents showing "permission" to fax) in TCPA cases. Had the requirement for written confirmation been in place at the time, this would not have been possible and millions of junk faxes may not have been sent. Maintaining the status quo should not be an option.

Public interest

ABM complains that requiring their members to obtain written permission to fax certain documents is not in the public interest. Other than stating it would be burdensome on their members, they provide no evidence. Quite the contrary, assuming only 5 million unsolicited faxes are transmitted to recipients around the country, and that they cost the recipient only 2 cents each⁸, that is a daily cost to the public of \$100,000. I can assure the Commission that the practice is far more pervasive than that, and that the average cost is considerably higher. The harm to the public far outweighs the burden on the faxers.

Conclusion

The Commission has done an excellent job with the new regulations. The elimination of the "established business relationship" exemption brings the regulations back into compliance with the law. The establishment of a written documentation requirement is to be loudly praised as it prevents companies from evading the law by simply declaring they had permission, or by creating documents that show permission when none was ever granted.

ABM's arguments are unlikely to be sustained and its Petition for Stay should be denied.

Wayne G. Strang

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⁸ Both are horribly conservative numbers. The medium used to transfer print in my machine costs 10 cents per page